UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT YOUNG,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 92-199-B***
	)	
DONNA E. SHALALA,	)	
Secretary of Health	)	
and Human Services,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION [1]

In this Social Security Disability appeal of the denial of the plaintiff's application for benefits, alleging a back impairment affecting his right lower extremity, the plaintiff asserts that the Secretary failed to show that he has the residual functional capacity to engage in sedentary work. In particular, the plaintiff contends that the Administrative Law Judge gave greater weight to the one-time consulting examiner and to the non-treating medical advisor than to the plaintiff's treating physician, and that the Administrative Law Judge arrived at his determination of residual functional capacity based on ``bare medical findings'' related to a CT scan when this data had not been reviewed by a medical advisor.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. 404.1520;

[1] This action is properly brought under 42 U.S.C. 405(g). The Secretary has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 12, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on March 1, 1993 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

Goodermote v. Secretary of Health & Human Servs., 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity since July 11, 1988 and met disability insured status requirements as of that date, Findings 1-2, Record p. 20; that he ``suffers from low back pain of unknown etiology, possibly due to a small focal disc herniation at the lumbosacral level of his spine on the right, which may be producing L-5 radiculopathy," Finding 3, Record p. 20; that during relevant time periods he had suffered neither from any impairment that fully meets the specific criteria of any of the impairments described in the Listings of Impairments of Appendix 1 to Subpart P of the Social Security Regulations No. 4 (the ``Listings") nor from any medically equivalent impairment, Finding 4, Record p. 20; that he is limited to sedentary work, being able to sit up to one-half hour at a time after which it would be necessary to change position and move around, and that the plaintiff's allegations that he was more functionally limited than that were not fully credible, were inconsistent with his described activities of daily living and were unsupported by objective medical evidence, Finding 7, Record pp. 20-21; that his impairments prevent him from performing his past relevant work, Finding 8, Record p. 21; that, based on the vocational expert's opinion, in view of the plaintiff's age (28), education (high school) and previous work history, he has the residual functional capacity to perform unskilled sedentary jobs existing in significant numbers in the national economy, Findings 5-6, 9, Record pp. 20-21; and that, therefore, he was not disabled at any time up to the date of the opinion, Finding 10, Record p. 21. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final determination of the Secretary. 20 C.F.R. 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. 405(g); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions

drawn. *Richardson v. Perales,* 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.,* 647 F.2d 218, 222 (1st Cir. 1981).

Since the Secretary determined that the plaintiff is not capable of performing his past relevant work, the burden of proof shifted to the Secretary at Step Five to show the plaintiff's ability to do other work available in the national economy. 20 C.F.R. 404.1520; *Bowen v. Yuckert,* 482 U.S. 137, 146 n.5 (1987); *Goodermote,* 690 F.2d at 7. The record, therefore, must contain positive evidence supporting the Secretary's findings regarding both the plaintiff's residual functional capacity and relevant vocational factors affecting his ability to perform other work. *Rosado v. Secretary of Health & Human Servs.,* 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs.,* 794 F.2d 14, 16 (1st Cir. 1986).

The Administrative Law Judge found that the plaintiff has the residual functional capacity to perform sedentary work. Sedentary work requires the ability to lift no more than ten pounds, to lift and carry small articles on occasion and to sit for approximately six hours per eight-hour workday. Walking and standing may be required, but generally not in excess of two hours total. *See* 20 C.F.R. 404.1567(a); Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service,* at 29 (1992).

In his decision the Administrative Law Judge considered the plaintiff's own testimony; the medical reports provided by the plaintiff's treating physician, Dr. Hayward (family practice); the medical report of an examining consulting physician, Dr. Irwin (neurologist); the testimony and report of a nonexamining medical advisor, Dr. Kellogg (internal medicine); and the testimony and report of a vocational expert, Ms. Hoffman.

The plaintiff testified that his right leg began bothering him in 1987, but that his back pain started ``a little while ago." Record pp. 35-36. He stated that he has sharp leg pain ``most every day" and back pain ``every time [his] leg hurts, most of the time." *Id.* pp. 36-37. His activities include one-half hour twice a week of mowing his lawn while sitting on a riding mower. *Id.* p. 37.

He can pick up one piece of split firewood, which he estimates to weigh 10-15 pounds, at a time. *Id.* p. 39. He carries groceries from the car. *Id.* p. 45. When hunting, he walks 150-200 yards over uneven ground to get to his field, but his ``hunting'' is basically sitting in the field. *Id.* pp. 47-48. He builds model airplanes on occasion, working on them for an hour out of a day. *Id.* p. 40. He stated that moving around, whether sitting or standing, does not help his pain, but that filling his wood stove (by pushing wood in) aggravates it. *Id.* pp. 54-55.

Dr. Hayward, who treated the plaintiff from June 6, 1989 through November 5, 1991, concluded that he should not engage in work requiring repetitive bending or twisting, should not be lifting more than ten pounds from the floor or carrying more than 25 pounds, should not perform any long standing more than four hours in an eight hour day and should only sit for short periods of time during which he must be able to get up and move around. *Id.* at 184. He suggested that when the plaintiff sits, he should do so in a straight-backed chair. *Id.*

Dr. Irwin, who examined the plaintiff on October 11, 1991, determined that there were no significant functional limitations. According to his report, there was no evidence of organic disorder and he could find no reason for the plaintiff's continuing complaints of thigh discomfort. *Id.* pp. 147, 150. He noted that the plaintiff had stated he felt he could lift 100 pounds as long as it did not involve repetitive motion. *Id.* p. 148. He stated that the plaintiff could stand and sit for several hours. *Id.* Although the Administrative Law Judge did not comment on it, these conclusions are consistent with those of another examining physician, Dr. Paul Brinkman, a general surgeon who examined the plaintiff on October 16, 1991, who stated in his report that the plaintiff could stand and sit for six of eight hours in a workday and could lift frequently up to 25 pounds. *Id.* p. 122.

Dr. Kellogg, the medical advisor, heard the plaintiff's testimony and reviewed the medical records, but did not examine the plaintiff. He specifically disagreed with Dr. Hayward's assessment, and found no basis in the record for finding a functional impairment that met or was

equal to the Listings. *Id.* p. 61. He stated in his own testimony that he thought that Dr. Hayward's assessment was done on the basis of subjective complaints, not clinical data. *Id.* However, he also noted that he would like to see further evaluation done and, speaking in reference to an earlier CT scan that had showed slight disc bulging, that further scanning might show a disc bulging ``that would lend an awful lot of credibility to the subjective allegations." *Id.* pp. 61-62.

The recommended CT scan was done on May 11, 1992. *Id.* p. 187. The Administrative Law Judge noted (in the language of the radiology report, *id.* p. 187-88) that it showed ``a questionably abnormal soft tissue density in the lumbosacral region, possibly representing a small focal disc herniation and possibly producing radiculopathy" and that, ``[i]n light of this development, [he] would have to agree that at least some of the claimant's subjective complaints are supported by objective medical data." *Id.* p. 17. However, the Administrative Law Judge stated that he did not find the plaintiff to be as functionally limited as Dr. Hayward suggested. *Id.* p. 18.

Whether or not the plaintiff is disabled depends upon his ability to do sedentary work. Although the plaintiff's testimony establishes that he has the ability to lift up to ten pounds as required for sedentary work, the evidence regarding his ability to sit for approximately six hours of an eight hour workday is less clear. For a finding that the plaintiff can sit for approximately six hours per workday, the ``Secretary cannot rely on a presumption of sitting ability sufficient to do sedentary work." *Rosado*, 807 F.2d at 294 (citation omitted). If there is a need to interrupt sitting with frequent intervals of rest, an individual may not be capable of sedentary work. *DaRosa v. Secretary of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986). In addition, someone who cannot remain seated ``most of the day" and who ``must often interrupt [his] sitting with standing for significant periods of time" is not capable of sedentary work. *Thomas v. Secretary of Health & Human Servs.*, 659 F.2d 8, 10-11 (1st Cir. 1981).

The plaintiff's testimony indicates that he can sit up to one-half hour on his riding mower

before feeling pain. The testimony regarding his working on model airplanes for approximately one hour at a time does not specifically indicate whether this is done sitting or standing or in combination. There is considerable conflicting evidence as to whether the plaintiff is capable of sitting long enough to be able to perform sedentary work as defined by the Secretary. Such conflicts and contradictions in the evidence are to be resolved by the Secretary, not the court. *Irlanda Ortiz v. Secretary of Health & Human Servs.,* 955 F.2d 765, 769 (1st Cir. 1991); *Rodriguez Pagan v. Secretary of Health & Human Servs.,* 819 F.2d 1,3 (1st Cir. 1987), *cert. denied sub nom. Pagan v. Bowen,* 484 U.S. 1012 (1988); *Sitar v. Schweiker,* 671 F.2d 19, 22 (1st Cir. 1982); *Rodriguez v. Secretary of Health & Human Servs.,* 647 F.2d 218, 222 (1st Cir. 1981).

The plaintiff, however, contends that, in arriving at his decision, the Administrative Law Judge discounted the opinion of Dr. Hayward, the treating physician, in favor of the opinions of a consultative examiner and a non-examining medical advisor and in favor of ``bare medical findings" from which the Administrative Law Judge himself concluded that the plaintiff had the residual functional capacity for sedentary work.[2] With respect to a treating physician, 20 C.F.R. 404.1527 provides, in part, that more weight will be given to treating sources because they are likely to be able to give a detailed, longitudinal picture of medical impairments than other sources. 20 C.F.R. 404.1527(d)(2). If the treating source's opinion concerning the nature and severity of an impairment ``is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record, [the Secretary] will give it controlling weight." *Id.* When the treating physician's opinion is not given controlling weight, the weight to be given various opinions depends on the application of several factors including the examining relationship, the treatment relationship, supportability (that is, the

[2] I note that although the plaintiff says in his Statement of Specific Errors, p. 7, that neither of the non-treating physicians had access to the medical record, Dr. Kellogg (medical advisor) did a review of the medical documentation. Record p. 17. There is nothing that indicates that Dr. Irwin did not have access to the medical file as well.

more a medical source presents relevant evidence to support an opinion, the more weight it will be given), consistency, specialization and other factors of which the Secretary may be aware. 20 C.F.R. 404.1527(d). The Administrative Law Judge explained, as required by 20 C.F.R. 404.1527(d)(2), why he credited the opinions of Drs. Irwin and Kellogg. This was not an outright discounting of Dr. Hayward's report; in fact it was considered. Record p. 16. However, a treating physician's conclusions regarding total disability may be rejected by the Secretary, especially when contradictory medical evidence appears in the record, and it is not error to decline to give weight to reports simply because they come from the primary treating physician. *Keating v. Secretary of Health & Human Servs.*, 848 F.2d 271, 275-76 (1st Cir. 1988).

Further, the weight to which reports by nonexamining physicians are entitled ``will vary with the circumstances, including the nature of the illness and the information provided the expert." *Rodriguez,* 647 F.2d at 223. The report of a nonexamining physician may be afforded greater evidentiary weight when it contains a careful consideration of the medical reports of an examining physician. *Berrios Lopez v. Secretary of Health & Human Servs.*, 951 F.2d 427, 431 (1st Cir. 1991).

Dr. Kellogg's testimony reflects a thorough review of the medical records. He stated that ``[t]he impairment that [the plaintiff] has is low back pain of undetermined etiology" and that ``I don't think that the cause of the low back pain is documented by the record." Record p. 59. He concluded: ``On the basis of the objective evidence there are no limitations. Only on the basis of the subjective evidence." *Id.* p. 60. In reference to progress notes in the record, he stated that Dr. Hayward's conclusions as to functional limitations were ``based on subjective allegations." *Id.* p. 61. He noted that Dr. Irwin, the neurologist, had found no objective evidence of an organic disorder. *Id.* The record in fact shows that Dr. Irwin had commented in his assessment of the plaintiff that ``I join the ranks of those who cannot find a specific reason for his continuing complaints of thigh discomfort" and that ``[the plaintiff] is aware that he has little evidence of

organic disorder and has described his own functional limitations . . . ." *Id.* pp. 150-51. Having reviewed the record and considered the sources of the various opinions, I conclude that there was no error in the weighing of the medical evidence.

Dr. Kellogg strongly emphasized the need for further evaluation. *Id.* pp. 61-62. In response, the Administrative Law Judge ordered a CT scan, which was performed on May 11, 1992.

The plaintiff asserts that the Administrative Law Judge, without any further medical input, used raw medical data from the CT scan to arrive at a residual functional capacity for sedentary work. It is true that neither Dr. Kellogg nor any other physician was asked to review the CT scan. The Court of Appeals for the First Circuit has held that since bare medical findings are unintelligible to a lay person in terms of residual functional capacity, an administrative law judge is not qualified to assess residual functional capacity based on a bare medical record. *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990). ``This principle does not mean, however, that the Secretary is precluded from rendering common-sense judgments about functional capacity based on medical findings, as long as the Secretary does not overstep the bounds of a lay person's competence and render a medical judgment." *Id.* at 329.

From the radiology report, the Administrative Law Judge concluded that, based on the existence of the ``questionably abnormal soft tissue density in the lumbosacral region," at least some of the plaintiff's subjective complaints are supported by objective medical data. *Id.* p. 17. While the language of the radiologist's summary of the results of the scan may suggest support for the plaintiff's complaints, the Administrative Law Judge is without qualifications to determine the significance of the radiology report as it relates to the plaintiff's subjective complaints. Whether the plaintiff's condition as revealed by the CT scan reflects upon his ability or inability to do sedentary work is first a medical question. Since the scan could have revealed information that would have given credence to the plaintiff's claim, it would have been a simple matter for the Administrative

Law Judge to have referred it to Dr. Kellogg or another qualified medical expert to render an opinion as to how this data related to the plaintiff's impairment. Instead, he used the radiologist's interpretation of the CT scan, expressed in medical terms, to form his own impression. While he could have relied upon an expert's conclusions as to the significance of the data and how it related to the plaintiff's residual functional capacity, it was error for the Administrative Law Judge to use this raw data in support of his own conclusion that the plaintiff was able to perform other work.

Because I conclude that this matter should be remanded on this basis, it is not necessary to address the hypothetical questions asked of the vocational expert. I note only that the hypothetical questions were asked and answered before the critical CT scan was performed. Even if they reflected evidence in the recore at the time of the decision depends upon the degree to which the assumptions underlying the questions are supported by a medical expert's opinion as to the significance of the data.

For the foregoing reasons, I recommend that the Secretary's decision be ***VACATED*** and the cause ***REMANDED*** for further proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 17th day of March, 1993.

David M. Cohen
United States Magistrate Judge